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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SETH HERNANDEZ,

Defendant and Appellant.

2d Crim. No. B228751
(Super. Ct. No. 1291722)
(Santa Barbara County)

Seth Hernandez appeals the judgment following his convictions for attempted murder (Pen. Code, §§ 664/187, subd. (a)),¹ two counts of assault with the personal use of a deadly weapon (§ 245, subd. (a)(1)), and misdemeanor exhibiting of a deadly weapon. The jury found allegations to be true that Hernandez inflicted great bodily injury in the attempted murder and one of the assaults (§ 12022.7, subd. (a)), and personally used a deadly weapon (knife) in the attempted murder (§ 12022, subd. (b)(1)). The jury found not to be true an allegation that the attempted murder was willful, deliberate and premeditated.

Hernandez contends the trial court abused its discretion and violated his due process rights by admitting evidence of a subsequent uncharged offense

¹ All statutory references are to the Penal Code unless otherwise stated.

under Evidence Code section 1101, subdivision (b). We conclude there was no prejudicial error and affirm.

FACTS

On November 8, 2008, Hernandez and friends Jesse Robert, Jason Lastra, and John Dons went to a party at the home of Jordan Goodie and Goodie's two brothers. Hernandez was intoxicated, and he was also distraught because his mother had recently been diagnosed with cancer. He was also carrying a knife. Hernandez got into an argument with Lastra and another man. Dons separated them and pulled Hernandez away. Robert told Hernandez that he should leave the party and the house. Hernandez went outside for a period of time and then came back into the house.

Later, Derek Mass and Hernandez got into an argument and both men went outside. Several other men followed and surrounded Hernandez. Hernandez pulled out a knife and waived it around. Hernandez also tried to punch Mass but missed. Mass punched Hernandez and Hernandez chased after Mass holding his knife. Another man also punched Hernandez. Fighting spilled out onto the street. Hernandez dropped his knife after being hit. Several partygoers wrestled with Hernandez for a while before the fighting stopped.

Jordan Goodie, one of the hosts, asked Hernandez to leave. Jesse Robert renewed his request that Hernandez leave as well and telephoned Hernandez's brother to come and pick him up. Hernandez would not leave without retrieving his knife which had fallen to the ground. Goodie, Lastra and another partygoer went outside to talk to Hernandez who was waiting for his brother to pick him up.

Jarvis Shelby arrived at the party to pick up a friend. He talked to several partygoers outside the house. Shelby and Hernandez argued. Hernandez, who had found his knife or was holding a second knife, lunged at Shelby and stabbed him in the neck. Shelby pulled the knife out of his neck and tried to defend himself. Someone tackled Hernandez forcing him to the ground. Other

partygoers punched and kicked Hernandez. Shelby was taken to the hospital where he received immediate surgery because his injuries were life-threatening.

Hernandez testified on his own behalf that he was drunk at the party, believed he was unwelcome, and stabbed Shelby because he did not want to wait around to be beaten up. He testified that he only nicked Shelby with his knife and did not intend to seriously injure or kill him. Hernandez testified that he was "trying to make a point."

DISCUSSION

Hernandez contends the trial court erred by admitting evidence of a jailhouse fight which occurred approximately six months after the offenses. The trial court ruled that evidence of the jailhouse incident was admissible to show intent, motive, and to negate a claim of self-defense. (Evid. Code, § 1011, subd. (b).) The court also ruled that the probative value of the evidence was not substantially outweighed by the danger of undue prejudice and would not confuse the issues. (*Id.* at § 352.) We conclude that the trial court erred by admitting the evidence but that the error was harmless.

The evidence at issue concerned an altercation which occurred when Hernandez was in jail awaiting trial for the charged offenses. A guard ordered Hernandez to come out of his cell during an exchange of linens. Hernandez came out of his cell as directed and was handcuffed. A deputy then told Hernandez to move further down the jailhouse corridor. Hernandez objected to moving further away from his cell, got angry, and lunged at the guard. The deputy assisted by other guards physically forced Hernandez to the ground. Hernandez continued to struggle and was tased.

Evidence that a defendant has committed crimes other than the charged offense is not admissible to show that the defendant is a person of bad character or has a criminal disposition, but is admissible to prove a disputed material fact such as motive, intent, common plan or scheme, identity, and absence of mistake or accident. (Evid. Code, § 1101, subds. (a) & (b); *People v.*

Thomas (2011) 52 Cal.4th 336, 354.) To be admissible, an uncharged act must be sufficiently similar to the charged offense to support a rational inference concerning a material fact other than criminal disposition. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) The strength of the inference in any case depends upon the number and distinctiveness of shared characteristics, and the tendency of the uncharged act to prove the disputed facts. (*People v. Thornton* (1974) 11 Cal.3d 738, 756, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) If evidence of an uncharged act is relevant, there is no distinction between an act which occurs *prior* to commission of the charged offense and an act that occurs *subsequent* to the charged offense. (*People v. Balcom* (1994) 7 Cal.4th 414, 425.)

The degree of similarity necessary to establish relevance varies depending upon the type of act the evidence is offered to prove. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) To be relevant to prove identity, the uncharged crime must be highly similar to the charged offenses, while a lesser degree of similarity is required to establish relevance to prove common design or plan, and the least similarity is required to establish relevance to prove intent. (*Id.* at pp. 402-403.)

As to intent, the "... recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish . . . the presence of the normal, i.e., criminal, intent accompanying such an act" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) The uncharged act and charged offense must be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance. (*Ibid.*; see also *People v. Kelly* (2007) 42 Cal.4th 763, 783.)

In addition, even if relevant to prove a material fact other than a defendant's criminal disposition, evidence of an uncharged act is subject to exclusion if its probative value is substantially outweighed by the probability of

undue prejudice. (Evid. Code, § 352; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) For this purpose, "prejudice" refers to evidence that uniquely tends to evoke an emotional bias against a party while having only slight probative value with regard to the issues. (*People v. Heard* (2003) 31 Cal.4th 946, 976.) We review a trial court's ruling under both Evidence Code sections 1101 and 352 for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.)

We conclude that the jailhouse incident was not sufficiently similar to the charged offenses to support the inference that Hernandez had the requisite intent or motive to stab Shelby, or to rebut his self-defense claim. The offenses, circumstances, setting, and conduct involved in the charged offenses and jailhouse incident have *no* clearly identifiable similarities. In cases allowing admission, the charged and uncharged offenses involved similar offenses, such as theft-related offenses, gang offenses, or sex offenses. (See, e.g., *People v. Jones* (2012) 54 Cal.4th 1, 50; *People v. Jones* (2011) 51 Cal.4th 346, 371; *People v. Foster* (2010) 50 Cal.4th 1301, 1330-1331.)

Here, both the charged offenses and the jailhouse incident involved violence but the nature and degree of violence was markedly different. At the party, Hernandez was armed, drunk, and in a rapidly changing social environment. He was among both friends and strangers and involved in arguments and fights with several of the partygoers over a significant amount of time before the stabbing. The incident in jail occurred when Hernandez was handcuffed and was a reaction to an order by a guard to move away from his cell. Even if both incidents involved some rejection of authority, the levels of authority were very different and the relevance of Hernandez's reaction to authority has little or no relevance to the offense of murder.

The fact that Hernandez acted with some level of violence in both the charged offense and the jailhouse incident is insufficient to support an inference that he acted with intent to kill in the stabbing of Shelby. Both events

show limited self-control, but that is a personality characteristic which does not permit a reasonable inference of Hernandez's intent in the stabbing of Shelby.

In any event, any error in admitting the evidence was harmless and did not deny Hernandez a fair trial. (See, e.g., *People v. Marks* (2003) 31 Cal.4th 197, 226–227.) Although the numerous confrontations prior to the stabbing were described differently by different witnesses, the evidence that Hernandez stabbed Shelby with the intent to inflict great bodily injury was overwhelming. By Hernandez's own testimony, there can be no dispute that Hernandez stabbed Shelby in the neck at a time when Hernandez was in no great danger.

Additionally, the trial court reasonably concluded evidence of the jailhouse incident was not unduly prejudicial because it would not tend to evoke an emotional bias against Hernandez. It was less inflammatory than evidence of the charged offenses, and there was no reasonable possibility that the jury would convict Hernandez of the charged offenses based on evidence of the jailhouse incident. There was no reasonable probability the verdict would have been more favorable to defendant had the court excluded the evidence. (*People v. Jones, supra*, 51 Cal.4th at p. 372.)

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Jean M. Dandora, Judge
Superior Court County of Santa Barbara

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